

No. 3932

IN THE

United States Circuit Court ¹²
of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLE,
Defendant, Respondent.

Brief of Appellant

Upon Appeal from the United States District Court
for the District of Oregon.

LESTER W. HUMPHREYS,
United States Attorney for Oregon,
For Appellant.

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STATEMENT.

This is a suit to cancel the citizenship of Joseph Woerndle, a naturalized German. After hearing the evidence, the trial court dismissed the bill. The Government appeals.

The facts were not disputed. Indeed they were, for the greater part, stipulated.

Woerndle was born in Germany. He came to the United States in 1897, and was naturalized in the Superior Court of the State of Washington at South Bend, August 23, 1904. Afterward he removed to Portland, where he studied law, was admitted to the bar, became the legal representative at Portland of the Austrian Consul, edited a German newspaper, and prospered.

The suit is based on fraud. The fraud charged is that Woerndle's oath renouncing allegiance to Germany and declaring allegiance to the United States was false, in that he secretly reserved and kept allegiance to Germany.

The Government's theory is that the sincerity of an oath of allegiance must be tested by those acts and words which are inspired by the first opportunity after naturalization to act or speak concerning America and the mother country; that the criterion of original fraud must be the later conduct, which

in its relation to the earlier attitude, will furnish safe ground for judgment.

The evidence showed that in October, 1914, after the European War began, and America had officially proclaimed its neutrality, Woerndle corruptly abused his American citizenship by lending it as a cloak to one Boehm, a German Reserve Officer, to the end that Boehm should and did travel from the United States, through belligerent zones to Germany, in the name and guise of Joseph Woerndle, American citizen. The detail of this incident is described by Woerndle himself in a dairy written by him under date October 2 and 3, 1914, in these words:

"2. Had a grand dinner with Paul Wesinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power of atty. and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my addres c/o Waldorf-Astoria, New York, where Boehm will call for it."

It was shown further that Woerndle wrote letters, when he believed the United States was on the point of entering the war in 1915 and 1916, which make a clear choice between the United States and Germany. In these letters he said, among other things:

“Judging from present conditions this country, too, will be involved in a war with Germany, loved, poor, unfortunate Germany. If I were out there today as three years ago, I would without hesitation sacrifice my all for loved old fatherland. Were it not for my family here I would have long ago returned to my old home to aid it in this time of greatest need. The American, moblike, would be glad, if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer, and hence perhaps not everything will be lost at once . . . but I may say to you, persevere to the last man, for as I hope victory will yet go to the Germans.”

“As it now seems, only God Almighty can

save us from war with my own Fatherland . . . The good beautiful land where my cradle stood, poor, poor Germany. Sad enough that our government supplies the English rag pack and others with shiploads of ammunition, but wants now also to declare war on Germany.

"And it now seems as if this country too wants to declare war on Germany. Kaspar, I do not know if after the war is over I will not return to the land of my cradle . . . I have three boys and these would perhaps be needed by my dear old Fatherland after the war.

"I am ashamed of the action of the American nation regarding Germany. But that America will be penalized for its double standard I have no doubt. If I were out there I would also be found in the trenches or on the battlefield—dead. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible.

"I am ashamed of the action of the American nation for they can never make reparation for it. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need. If I were in Germany as three years ago, I would gladly allow myself to be put in uniform or otherwise be of benefit to the

Fatherland. Do you think the Germans will be victorious? God grant it. This is perhaps the last letter that I can send direct to you, for if I am not deceived, this Country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off.

"There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies.

"But only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left.

" . . . and it looks as though he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the blood bath which he here prepares will

outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he shall persist to throw this country into the mouth of inhumanity and war."

Meanwhile Boehm had gone to join the German forces, secure in the protection of Woerndle's passport. Then came February, 1917. On the 1st of February, 1917, Woerndle was startled by these headlines in the Portland "Oregonian."

"PASSPORT CASE PROBED
EXTRADITION OF CAPT. BOEHM
IS CONSIDERED.

"All persons connected with issuance of papers to German to be called to Account by Washington."

The newspaper related that Boehm had been arrested by the British at Falmouth, England, enroute from Spain to Holland traveling with a fraudulent American passport, as Jelks Leroy Thrasher.

The next day, February 2, 1917, the "Oregonian" again had news of Boehm, under this heading and opening paragraph:

**"BOEHM KNOWN HERE
MAN HELD AS GERMAN SPY IS FORMER
PORTLAND MAN**

"Capt. Hans Boehm, who is accused of traveling as an agent of the German government with an American passport bearing the name of Jelks Leroy Thrasher, and whose case is undergoing a rigid examination by the State Department at Washington, is well known in Portland."

Woernidle saw these articles, and realized the enormity of his offense in connection with the passport of October, 1914. He turned back the pages of his diary and cut out the entries of October 2 and 3, 1914, heretofore quoted. He rewrote the events of those days on another page, and pasted the rewritten page on the stub of the page he cut out. The original and substituted entries are as follows:

Original Entries.

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power

As Rewritten.

"Had a grand dinner with Paul Wessinger . . . and H. W. Boehm. Maybe I can't go with Boehm after all, but he says he will go in spite of hell. I only pity my poor father but then my own family and children. Cecelia does not want me to

of atty and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address c/o Waldorf Astoria, New York, where Boehm will call for it.”

go and maybe I wont, but I can't just stay. At any rate I will get my passport in shape so as to have that part ready if I should decide to go. Wrote to Sec. of State to forward my pass to Waldorf Astoria Hotel where I will call for it. Boehm urges all he can for me to go with him. Maybe I will but there will be a surprise when I am gone.”

In December, 1918, information of Woerndle's aid to Boehm reached the United States Attorney at Portland. Affidavits for search warrants were made and warrants issued upon which the Marshal searched Woerndle's office and home, and found Woerndle's diary, copies of his letters and other papers. After this suit was begun, Woerndle petitioned the Court in November, 1921, for the return of these documents, alleging that the search was illegal.

It was apparent that the affidavits for search warrants did not meet the requirements of the statute, and no objection was made by the United States Attorney to the return of the papers. The Court ordered them returned, but refused to order that copies of them be surrendered by the United

States Attorney. The originals were delivered to Woerndle. Afterward, in February, 1922, the government applied to the Court for an order to require Woerndle to produce these originals at the trial. The order was made, but neither the documents nor copies were offered in evidence. Their contents had been covered by a stipulation of facts.

As to the facts thus agreed upon, the stipulation waived "any and all objections of every kind as to the manner of proof and as to the sufficiency of proof" but reserved "all other objections as to the competency, relevancy and materiality of these facts." As to the letters the stipulation reserved additional objections as follows: "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved."

Defendant was a witness in his own behalf.

The Court made no findings, but filed a memorandum opinion, holding the evidence insufficient, and dismissed the bill.

SPECIFICATION OF ERROR.

1.

The Court erred in holding that a passport fraud, deliberately perpetrated upon the United States by the naturalized German, Woerndle, then in the employ of the Austrian Consular Service, in October, 1914, by which he aided a German Reserve Officer,

then in the United States, to assume the identity and citizenship of Woerndle, and return through belligerent territory under fraudulent protection of American citizenship to enter the German military service; together with letters written by Woerndle when it appeared to him that the United States was about to enter the war, saying he was ashamed of the action of the American nation, that if he were in Germany he would gladly allow himself to be put in uniform and would be found in the trenches or on the battlefield, dead, with other similar expressions and with the other evidence in the case, did not show that Woerndle had not honestly renounced allegiance to Germany; this having been his first opportunity after his naturalization to exhibit by word or act, his true allegiance.

II.

The Court erred in holding that Woerndle had been loyal to the United States after February, 1917; the undisputed evidence showing that Boehm's passport fraud was discovered then, but Woerndle's part in it still unknown; that the government then began an investigation, and that Woerndle, on learning of the investigation, became fearful and concealed evidence of his part in it, by cutting an incriminating page out of his diary, and pasting a rewritten expurgated page in its place.

The Court erred in failing to hold that when

Woerndle, a lawyer admitted to the bar in 1909, the sole representative at Portland of the Austrian Consulate, the editor of a newspaper published in German at Portland, did the things set out in specifications I. and II. his acts were inspired by an allegiance to Germany superior to his allegiance to the United States.

IV.

The Court erred in holding that the evidence was insufficient to support plaintiff's bill of complaint.

V.

The Court erred in dismissing plaintiff's bill of complaint.

VI.

The Court erred in failing to decree the cancellation of Woerndle's citizenship.

POINTS AND AUTHORITIES.

I.

(a) In a suit to cancel a certificate of citizenship, the criterion of original fraud must be the later conduct, and the fidelity of an alien at the time of his naturalization must be determined by trying out his attitude of mind and heart in later years when there first arises an occasion for him to exhibit by act or speech his real sentiments as between his native country and America.

Schurman vs. United States, 264 Fed. 917

(9CCA) 18 ALR 1182-1185.

United States vs. Kramer, 262 Fed. 395
(5 CCA).

United States vs. Herberger, 272 Fed. 278.

United States vs. Darmer, 249 Fed. 989.

United States vs. Wursterbarth, 249 Fed. 908.

(b) Disloyalty of a naturalized citizen, *prima facie* establishes fraud in his naturalization. It requires explanation to overcome it, and the burden of explaining is on the defendant. *Id.*

II.

Allegiance to America is not a thing of war time only; it is equally a condition of peace.

III.

From August 4, 1914, the neutrality of the United States was officially proclaimed by the president; and citizens were enjoined to observe the laws of the United States, and were warned that any misconduct was at their peril.

38 Stat. Large, Part 2, pp. 2001-2024.

IV.

In October, 1914, there was a conflict between the interests of the United States and of Germany. Woerndle's duty to the United States required him to leave its neutrality free from embarrassment. Germany's interest required that its military agent, Boehm, return safely from America to Germany.

Woerndle thereupon used his American citizenship in aid of Germany, placing his devotion to Germany above his duty as a citizen.

V.

In writing letters, Woerndle had in contemplation war between the United States and Germany. His condition of mind was the same as if war had actually been declared.

VI.

When Woerndle, having in mind war between the United States and Germany, wrote that he would without hesitation sacrifice all for loved old fatherland, that his three boys would perhaps be needed after the war by his dear old fatherland, that he was ashamed of the action of the American nation, that he would not much regret being chased out of the United States as a German, that if he were in Germany he would be found in the trenches or on the battlefield, dead, and similar expressions, he was inspired by such an adherence to Germany and hostility to the United States that his oath of allegiance could not have been sincere and honest.

VII.

After Boehm's arrest early in 1917, and the government's investigation was announced, Woerndle was so fearful of the consequences to him that he

concealed evidence of his fraudulent and unlawful conduct. His conduct thereafter was inspired by fear of prosecution, and for that reason it has no probative value favorable to him.

VIII.

The trial court made no findings of fact. The facts were not disputed. The passport fraud and the letters were stipulated. The Court is not asked here to review a finding made on conflicting testimony where the trial judge was aided by personal observation of the witnesses. The presumptions arising in favor of such findings do not attend this case. The question here is whether the Court erred as to the effect of uncontroverted facts; and in that view the case is here *de novo*.

U. S. vs. Booth Kelly Lumber Co., (9 CCA)
203 Fed. 423-429.

Booth Kelly Lumber Co. vs. U. S., 237 U. S.
481-484-486.

Waterloo Min. Co. vs. Doe, (9 CCA) 82 Fed.
45-51.

The Santa Rita, (9 CCA) 176 Fed. 890-893.

IX.

An opinion of a trial judge in an equity case is not "a finding and statement of facts."

Hendryx vs. Perkins, (1 CCA) 123 Fed.
268-270.

X.

Facts obtained by an invalid search do not thereby become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others.

Silverthorne Lumber Co. vs. U. S., 251 U. S.,
385-392.

XI.

A suit to cancel a certificate of citizenship for fraud is not a criminal proceeding nor a suit for a penalty or forfeiture.

Johanessen vs. U. S., 225 U. S. 227-242.

Luria vs. U. S., 231 U. S. 9-24.

U. S. vs. Ellis, 185 Fed. 546-549.

ARGUMENT.

This case can be stated in a single question: was Woerndle's oath of allegiance sincere and honest? For if not, it was a fraud upon the Court that admitted him.

We measure the sincerity of a man by his acts and words. We must know also what manner of man he is, his education, position, and daily occupation. By these we estimate his capacity to realize the consequences of his acts and words.

Let us see then who Joseph Woerndle was. He was born in Germany of poor parents. His father

and brothers made sacrifices to the end that he might go to college in Germany. He came to the United States and began as a laborer. He studied law, and in 1909 was admitted to the bar of Oregon. In 1914 he had been practicing law for five years in the City of Portland. He was the sole representative at Portland of the Austrian Consul, who was located at San Francisco. Austrians went to him for information and advice when the war began. (Trans. p. 180.) He was the editor of a newspaper published in German, for which he wrote editorials. From the beginning of the war, he was active in raising money for the German Red Cross and other like enterprises.

German collegian, law graduate, practicing attorney, legal representative of the Austrian Consul, newspaper editor; he was in 1914 by education, by occupation, by association and by his interests peculiarly well equipped to understand fully the consequences of what he said and did. His capacity for full understanding was beyond that of the average citizen. His sympathies were kept alive by his employment by the Consul, by editing a newspaper in his native tongue, and by the presence of relatives in Germany.

Such was the man whose sincerity is here in question. He had sworn allegiance to the United States in 1904; he had said under oath that he renounced

and abjured all other allegiance, and particularly he had put off allegiance to Germany.

By his own admission (Trans. p. 180) he was aware of the issuance by the President of proclamations of neutrality. In these proclamations is this language:

“And I do further declare and proclaim that the Statutes and the treaties of the United States, and the law of the nations alike require that no person within the territory and jurisdiction of the United States shall take part, directly or indirectly, in said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

“And I do hereby enjoin all citizens of the United States and all persons residing or being within the territory or jurisdiction of the United States to observe the laws thereof and to commit no act contrary to the provisions of the said statutes or treaties or any violation of the law of nations in that behalf.

“And I do hereby give notice that all citizens of the United States and others who may claim the protection of this Government, who may misconduct themselves in the premises, will do so at their peril, and that they can in nowise obtain any protection from the Government of the United States against

the consequences of their misconduct.” (38 Stat. L. part 2, 2001-2024.)

These proclamations were issued in August, 1914.

What is allegiance? Its essence is fidelity. It is the “fealty or fidelity of a person to the government of which he is a citizen.” (2 CJ 1149) Fealty is “fidelity to one’s lord; fidelity; constancy; faithfulness” (Webster) Fidelity is “adherence to a person or party to which one is bound; loyalty” (Webster). Woerndle’s duty to America required of him fidelity, no more, no less. And it was a self imposed duty. He put it upon himself. No man asked him to renounce Germany; no man required him to become an American citizen. It was his own choice. When he had chosen, America asked but little of him, only fidelity; merely that he be sincere and honest in his voluntary oath.

The Supreme Court used this language in the Luria case, (231 U. S. 9-23) “These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself.”

Allegiance is not a thing of war time only. It is equally a condition of peace. Nor is it only in war that we see the signs by which we may know it, or find that it is absent. It is more readily discovered in war time. In peace, ordinarily, there is nothing to call for its expression; for it is largely a sentiment and not usually displayed in peace. It is hard to prove or to disprove until some conflict of interest between the mother country and the adopted country brings it to light. Such a conflict need not be actual war, if the needed probative facts are developed. When a conflict of interest arises, acts and words betray the real allegiance of the individual; and by them must his sincerity and fidelity be measured, for there is no other standard by which to gage them.

In October, 1914, Germany was at war; America was neutral. America's interests required that her neutral role be free from embarrassments; that she be not exposed to greater difficulties and dangers than were necessarily incident to her position as between the belligerents. It was the duty of every citizen so to conduct himself as to avoid putting America in jeopardy. This was Woerndle's duty. But he was in Portland with a German reservist, who wanted to go to Germany. Germany's interest was to increase her man-power; it required that her reservist return to join the armed forces. Woerndle clearly saw that

Germany's interest required that Boehm have an American passport. It was equally clear that America's interest required that Boehm not have the passport, that none have a passport except genuine American citizens going abroad on legitimate business. For already there were in Europe thousands of Americans looking to their government for its protection.

In Woerndle's mind, at least, the interests of Germany and of America came squarely in conflict in October, 1914. In this conflict what show of allegiance did he make? He used his American citizenship in aid of Germany, to increase her man-power. He violated the laws of the United States so that a passport could be obtained for a German military officer. He used a land patent issued by the American government—another privilege of citizenship—to enable the German Boehm to make false proof of his identity as an American citizen. In short, when the good faith of his American citizenship was put to the test, his conduct revealed that American citizenship was merely a cloak to serve his own and Germany's purposes, and that at heart he was not an American citizen.

On the first occasion that arose after his naturalization to test his fidelity, he multiplied the difficulties and dangers of America's neutral role by a fraud in-

tended to put upon America the duty of protecting as a citizen a German officer traveling through belligerent zones to join the German forces. His certificate of citizenship was another "scrap of paper," valuable only to the extent that it was useful in aid of Germany.

His conduct was against ordinary decency, it was against his oath, against his duty to America and against the law. He freely sacrificed America, and used all that America had given him, to aid Germany. He was willing to, and did, commit a felony—risked imprisonment in the penitentiary and attendant loss of his civil rights—to aid the country whose allegiance he had renounced. He admits that he knew as a lawyer, in 1914, that he was committing a felony (Trans. p. 180). He was willing to expose the United States to such grave international embarrassments as might have resulted from finding a German military agent traveling in the guise of an American citizen, with a passport valid on its face, and regularly issued by the Department of State, but in fact fraudulent because it was carried by Boehm and not by Woerndle, and this with Woerndle's connivance and aid.

This fraud was willful and deliberate on the part of Woerndle. Not only did he act without urging, but it was he who contrived the scheme. "The de-

fendant Woerndle on the witness stand in his own behalf testified that when he discussed the passport matter with Boehm in 1914, Boehm said he wanted to go to Germany, but could not because he could not get a passport, not being an American citizen, and that Woerndle offered Boehm, Woerndle's passport and other papers for identification." (Statement of Evidence Trans. p. 171.)

Woerndle sought to avoid the effect of this event by explaining that he was filled with anguish over the condition of his father and relatives in Germany, and that he only had in mind "to give what aid he could to the place of his birth, and to bring it to his father." (Trans. p. 174.) This explanation is contradicted by his own diary entries of October 2 and 3. This diary had been a daily habit for years, where he "wrote down occurrences and his feelings and thoughts." (Trans. p. 174) No note of anguish is in these entries.

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty and make will.

"3. Boehm gave me power of atty and drew will. I will furnish him with pass— & U. S. citizen papers so he can travel in my name. Also

gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address care Waldorf-Astoria, New York, where Boehm will call for it."

Are these the feeling and thoughts of a man torn with anxiety for his aged father? Of a man whose only motive in his fraud was to send a person to comfort the venerable parent in Germany?

Not the stain of a filial tear is on those pages. But rather the diary discloses a dinner where the clinking of steins was punctuated with "Hoch der Kaiser" and the chorus of "Die Wacht am Rhein," while gleeful plans were made for Boehm, and German hearts swelled with pride in the officer who was going back to fight for the Fatherland, and in the clever idea that he should go safely, protected and identified as an American citizen.

Woerndle did not even mention his father to Boehm, as is shown by a letter written by Woerndle to Boehm nearly two years later, July 14, 1916, in which he said:

"Do you in your travels ever get near Rosenheim, Bavaria? My folks live at Bernau am Chimsee. They would be glad, I am sure, if you could say 'Hello' for me." (Trans. p. 165.)

As was said by the Supreme Court in *Booth Kelly Lumber Co. vs. U. S.* 237 U. S. 481-486 "the explanations fail to escape the effect of the incontrovertible facts."

THE LETTERS

During 1915 and 1916, Woerndle expected war between the United States and Germany. This is abundantly proved by the following statements in his letters:

May 14, 1915. "Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany." (Trans. p. 128.)

May 31, 1915. "Only God Almighty can save us from war with my own Fatherland." (Trans. p. 126.)

May 31, 1915. "And it now seems as if this country too wants to declare war on Germany." (Trans. p. 132.)

June 5, 1915. "This is perhaps the last letter I can send direct to you for if I am not deceived this country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off." (Trans. p. 139.)

July 26, 1915. "There is no more neutrality

or impartiality, for the second American note to the German Government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies." (Trans. p. 141.)

May 8, 1916. " . . . And it looks as though he were lending every effort to throw our country into this war." (Trans. p. 157.)

These expressions show, so far as Woerndle's mind was concerned, a conflict of interest with the mother country practically equal to a state of war. That he was mistaken, that actual war did not come until April, 1917, does not matter. The probative value of his letters is equally great. We are trying the state of the man's mind, inquiring as to the sincerity and honesty of his oath.

If he believed war to be imminent and inevitable, his words were as expressive of his mental condition, as had war existed. These expressions and their effect, appear to have been entirely overlooked by the trial court.

Having in mind a state of war between the United States and Germany, Woerndle

1. Expressed strong affection for Germany (May 14, '15, Trans. p. 128; May 31, '15, Trans.

p. 126; June 5, '15, Trans. p. 138; July 26, '15, Trans. p. 141; Dec. 10, '15, Trans. p. 148.)

2. Condemned and ridiculed America (May 14, '15, Trans. p. 130; May 31, '15, Trans. p. 126-128; June 5, '15, Trans. p. 137-139; July 26, '15, Trans. p. 141-142; Nov. 26, '15, Trans. p. 146-147; Feb. 18, '16, Trans. p. 154; May 8, '16, Trans. p. 157).

3. "Would without hesitation sacrifice my all for loved old Fatherland." (May 14, '15, Trans. p. 129; June 5, '15, Trans. p. 138.)

4. Would have returned to Germany to aid it. (May 14, '15, Trans. p. 129.)

5. Hoped for Germany victory. (May 14, '15, Trans. p. 131; June 3, '15, Trans. p. 135-137; June 5, '15, Trans. p. 139.)

6. Would give his three boys to "my dear old fatherland." (May 31, '15, Trans. p. 133.)

7. Was ashamed of American action. (June 3, '15, Trans. p. 134; June 5, '15, Trans. p. 138.)

8. If over there would be in the trenches or on the battlefield, dead. (June 3, '15, Trans. p. 135.)

9. If there would be found on the firing line. (June 3, '15, Trans. p. 137.)

10. If in Germany would gladly allow himself to be put in uniform or otherwise be of benefit to the Fatherland. (June 5, '15, Trans. p. 139.)

11. Would not much regret being chased out of here as a German. (Nov. 26, '15, Trans. p. 147.)

12. Could not have much respect left for this country. (Nov. 26, '15, Trans. p. 147.)

13. Said "for Germany to do what the government here demands is unthinkable." (May 31, '15 Trans. p. 126.)

14. Thought the Emperor was "the greatest man that ever lived, the ablest soldier, diplomat and ruler." (May 8, '16, Trans. p. 158.)

15. Said that if America enters the war, "here too there will not remain one stone upon the other . . . for the blood-bath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe." (May 18, '16, Trans. p. 157.)

If these sentiments discharge the duty of a naturalized citizen, an oath of allegiance is mere nothing. If this is the fidelity that allegiance means, proceedings for naturalization are but vain pomp and circumstance. If naturalized persons are to be told by

Court decision that these things meet the obligations of American citizenship, it would be as well to repeal all naturalization statutes, and say at once that citizenship requires nothing more than residence in the United States.

These letters show a clear and decisive choice between the United States and Germany. They cannot be waived aside as merely the children of "sympathy with the land of his birth and anxiety for her success." (Trans. p. 117.) They express so powerfully his living affection for his native country as to leave no room for fidelity to America. They are not merely pro-German and anti-British, anti-French, anti-Italian; but they are pro-German and anti-American, and that in an atmosphere of war.

Woerndle's letters appear in full at pages 126 to 171, of the transcript. A reading of them must inevitably lead to the conclusion expressed by Judge Cushman (*U. S. vs. Herberger*, 272 Fed. 278-290) in a similar case:

"I have looked in vain for any note of reluctance in this self imposed task, he had set for himself, of abusing his adopted country. There is too much zest and gusto in the manner in which he goes about it for the court to conclude that he had not his heart in it."

The letters will not be repeated in full here, but those portions are copied which have to do with America and Germany.

“May 14, 1915, Dear Parents . . . this perhaps will be the last letter for some time which may reach you. Judging from present conditions this country too will be involved in a war with Germany, loved, poor, unfortunate Germany. Haunted and persecuted by the whole world, under all possible excuses made, belied and invented. What the outcome may be is a riddle, but at any rate the whole world will rise in rebellion and when everything will be over, there will not be very many people left. What bullet and sword will not take, pest and collera will claim. It is horrible to think about it. And yet we have here in the land of plenty no conception. If I were out there today as 3 years ago, I would without hesitation sacrifice my all for loved old fatherland, for now for the first and perhaps the last time Germany is depending on all help from child to dotard to save it from the claws of its arch enemy, England and its allies. I learn with shudder of the colossal sacrifices which Germany now makes and its people, but it is better, a thousand times, to die the death for Fatherland than to eke out an existence in the

shackles of the most sordid nation on earth, England. Were it not for my family here, I would have long ago returned to my old home to aid it in this time of greatest need, but as it is, such a thing is not possible. . . . The Americans, moblike, would be glad if it could get one over on Germany, but the German Michael will not have to be afraid very much. The United States are noisy, but when it comes to do something they are slow. This nation could not force ragged Mexico to salute the American flag. They will not risk to go to Germany, otherwise the Japanese may soon take possession of the best part of our coast, for they have aimed for it a long time. Our good President keeps shop open whenever it goes against the Germans, but whenever the English are guilty of anything, he is mum and blows the trumpet of peace. It fills me with with sorrow if our beautiful country should be drawn into this sad war, for the will of the masses and of the more sensible classes is not for it, but if it cannot be helped we will have to go to it, at least financially. Few Germans will shoulder arms, and of the others not many will put their head in front of a Howitzer and hence perhaps not everything will be lost at once. I am only sorry for the many human lives, but I may say to you, persevere to the last man

for as I hope victory will yet go to the Germans. . . .

5-31-15. My dear Mr. Hoerner: Reading the news as they come over from all sides, I am overcome with a feeling of sadness, and as it now seems, and judging from today's evening paper headlines, only God Almighty can save us from war with my own Fatherland. It seems now as if the American Government has lost its head or is about to lose it. What will all happen if this takes place is hard to imagine. One shudders by the thought. The good, beautiful land where my cradle stood, poor, poor, Germany. The sword in hand it is now fighting nearly against the whole world. I shudder at the thought. What will all yet happen and what will be the outcome. Sad enough that our Government supplies the English ragpack and others with shiploads of ammunition, but wants now also to declare war on Germany. Almost unbelievable, and yet it may come to pass. For for Germany to do what the Government here demands is unthinkable, because should they do that and call off submarine warfare, they may just as well ask for peace, for many hounds are the hare's death. But I hope it will not come that far. I cannot conceive how it is possible that Germany has

held out this far, without provisions and soldier supply from without. And yet I expect and hope that Germany will come out victorious. How that is possible I cannot imagine, but she will and must be victorious. . . . My youngest brother was already drafted last January. Has 5 children and a wife. Horrible, if one thinks about it. Maybe the same will happen to us here. People here as it seems, are about to lose their whole sense, and it is hardly believable that a country like ours, which has trumpeted out into the world the call of freedom and the protection of the weak, has stepped so low as to support a bloodstained, treacherous people like England, as it is now doing. But penalty will not remain away, and our neat Government will yet perhaps bitterly regret all. Him whom the Lord wishes to destroy, he smites with blindness, and the whole Wilson-Bryan Kraut will have a frightful responsibility for the millions of human lives destroyed thru our bullet manufacture. . .

"5-31-15. Dear Brother Kasper: . . .
How it now looks at home I have no idea, since Italy too, the treacherous, mutinous pack has declared war on Germany and Austria. It is horrible to think about it, and the outcome makes one shudder. Has Donat already been

drafted with wife and 5 small children at home. And it now seems as if this country too wants to declare war on Germany. Considering the great sacrifices this war has cost already, one can hardly understand that there are yet soldiers left, without new additions or other supply from without. One can only do one thing and that is to leave all to God Almighty. . . . Kasper, I have received the deed from Notary Weiss. I had it executed here and filed with my papers with a note, that if anything happens to me that it shall be sent to you. Kasper, I do not know if after the war is over I will not return to the land of my cradle, and if I should do so would want to build a house on the place. I have three boys and these would perhaps be needed by my dear old Fatherland after the war. When the war is over I will know more how everything is. . . .

"6-3-15. My dear Aunt: I received your dear letter just now and am very happy to have heard from you. I have written you twice already, but it seems that my letters have not reached you. I have not heard from you for a long time, and if you have written me, your letters did not get here. . . . It is horrible about this war and the end is not yet in sight, and how it ends no

one knows. I am ashamed of the action of the American government regarding Germany, for the people do not sanction these actions, but nothing can be changed. We do everything in our power to avoid the worst, but it's just like pouring water on a duck's back. But that America will be penalized for its double standard I have no doubt, just like Italy. My younger brother will already have joined the colors, since he was already drafted last December. Kaspar, the older one, is at home yet . . . If I were out there, I would also be found in the trenches or on the battlefield—dead—. For I would not stay away. We have just received the news that Przemyśl is fallen and in the hands of the confederates. What happy news but what against so many. We hope and pray that the Germans will win out in the end, but human strength only does not seem to make it possible. . . .

"6-3-15. My dear Aunt: . . . It is indeed horrible about this disastrous war, and I hope it will soon be over. The American way of dealing is much to be regretted and the consequences will not remain away. Just now news reached here that Przemyśl was again conquered by the Austrians, which news naturally has caused considerable rejoicing among the

Germans here. Otherwise everything is friendly towards England as far as the press is concerned, but not the people. Our ruling powers are related by kinship with the English aristocracy and there is where the dog lies buried. Could Washington rise from his grave he would be ashamed of our present administration, which as it appears, will do anything to play into the hands of our archfoe, England. And too Italy, this low treacherous band, has thrown herself into the arms of England. But she too will receive her reward for her high treason. Keep up hope, for God will righten everything, and Germany will and must be victorious. I have not heard from Father for some time and neither from my brothers. Donat was already drafted last December, and will no doubt be for some time on the firing line. And if I were out there, I would be found there too. . . .

"6-5-15. Dear Aunt: . . . Yes, dear Aunt, it is horrible about this war, and an end not yet in sight. And now too treacherous Italy is gone over to the other side and it seems to me that when this war is once over there will not be much young manhood left. I am ashamed of the action of the American nation for they can never make reparation for it, and yet in spite of all efforts

and work it seems that the labors of the Germans make no impression in Washington. Under separate cover I am mailing you a copy of my newspaper. My editorial (signed) just about illustrates the true situation here. You also notice my appeal for aid, but so much has already been collected from other sources, and the people on account of growing indifferent, are not donating very much anymore. I wish I had the means, I would be glad to give all to beautiful old Fatherland to aid it in this hour of need.

. . . I only hope that the Italians will get their neck broke for them and the English deserve the most. If I were in Germany as 3 years ago, I would gladly allow myself to be put in uniform, or otherwise be of benefit to the Fatherland. . . . How everything will come out, God only knows. What do you think about it? Do you think that the Germans will be victorious? God grant it! Here everything is stagnant, and business is at a standstill. Wilson with his half bankrupt machine is trying to polster up with ammunition, powder and bullet trade his miserable stewardship, but he will not succeed and in one and one-half years he will be out. This monster will not again be re-elected. And all in the most hypocritical fashion for "Human-

ity" and furthering of "Civilization." Such absurdity and hypocrisy. But he too will also get his reward. . . . This is perhaps the last letter that I can send direct to you, for if I am not deceived, this country too tries to break with all force the peaceable relations with Germany, and if once diplomatic intercourse is suspended, a declaration of war will not be far off. Then something may develop here of which we have no conception. . . .

"July 26, 1915. Dear Parents: I have just received your letter of June 30th and learn with great sorrow that Donat had to move to the front and that he is already 3 months incorporated in the field forces . . .

It is shuddering if one takes into consideration the many human lives which this war has already claimed, and yet will claim, but there is no turning back for Germany, for as a nation she would be gone if this war were lost. People here learn with admiration how the German people to the last man have collected around the flag and sacrificed the last drop of blood for the salvation of German honor and the German nation. A people like the German is not to be found in the whole world, and if one reads of the English labor strikes and the like, it fills one

with disgust, tho it be to the advantage of Germany; but one can see of what caliber the English are made. . . . Forward and forward is the battle cry until the last hostile flag covers the dust. The stand of our administration regarding the German course, is mildly said, regrettable. 'There is no more neutrality or impartiality for the second American note to the German government shows without doubt that the American government wishes to paralyze the submarine warfare so as to play in this way into the hands of Germany's enemies. How such a thing, considering the American war of independence with the same suppressor, England, is possible, is inconceivable and it seems that American gratitude is of short duration. . . .

"Nov. 26, 1915. Dear Brother Kaspar: . . . Times here are not the best and tho our administration tries to avert a crash with ammunition trade, nothing, it seems, is going ahead. There is no blessing in things of this kind, and the thought that this country has to enrich itself on thus acquired blood money is not less horrible, but retribution will here also be in its wake, and the proverb, 'As won so lost,' will also here hold good.

"Regarding my piece of land would say that

both of you can use it. . . . I shall have the deed which you sent me acknowledged before a consul and will then send it to you. But, dear Brother, I am doing this so you have it on hand in case something should happen to me, which no one knows, but only in case of my death I want you to inherit this land. As long as I live myself I may need it perhaps to build a house on it and to live in it if the Germans once should be chased out of here. Would not be regretted much for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left. . . .

"Dec. 10, 1915. My dear Brother: . . . I expect eagerly every day the news edition, thinking that every hour may bring armistice and negotiations of peace, and yet that time is yet somewhat off. Victory for Germany too means much for us, for you have no idea how much the of the war and a German victory means the German population and business world under present circumstances has to suffer, for the end resurrection of German influence in the whole world and would without doubt help us here too immensely. . . . It is almost unbelievable and sounds like a fairytale, hard to believe, and only God's help, faith, German unity, belief, hope

and denials have made it possible to achieve victory over the whole world. Here we did our best with money, agitations, etc., etc., but with an administration as we have it, not much can be accomplished. Only last week we held a Red Cross bazaar, and netted over \$3000, and throughout the whole United States people are busy working so that as much as possible can be done for the old Fatherland. I hope that the war will soon come to an end so that everything will again liven up and begin anew. . . .

"Feb. 18, 1916. Dear Sister-in-law: . . . Here times are miserable, at least out West. In the East things go somewhat better because the people have more work (perhaps in the ammunition factories). A shudder overcomes a person when one thinks that for filthy money millions of dollars worth of shrapnels are manufactured to slaughter thousands of young human lives. But all protestation appears to be fruitless. What visitations God Almighty reserves for us remains to be awaited, but we as Americans can surely expect no blessing for it. . . .

"May 8-16. My dear Brother: . . . I cannot understand that the stupid French cannot see that they are in vain sacrificing their sons to salvage damned England's chestnuts from the

fire. And that our country too should offer herself for cursed gold to furnish tools of murder to blow hundreds of thousands of human lives out of existence. We protest, telegraph, argue, and do all we can, but all our efforts seem to have no effect upon the Administration in Washington. And an end not yet in sight. Our can never repair for the curse of his deeds, for it seems as if he has sold his soul and body to the devil and his ally England, and it looks as tho he were lending every effort to throw our country into this war. But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the bloodbath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe. This monster of a president seems not to notice the bloody handwriting on the wall, but it will be that much more red when the hour comes, and he shall persist to throw this country into the mouth of inhumanity and war. I hope it will not come that far and that the good common sense of the American people will not leave them at this hour. . . . The whole world admires the Emperor, for he is perhaps the greatest man that ever lived, the ablest soldier,

diplomat and ruler, and I hope he will succeed to lift the world back upon its axle. If he can't do it, nobody else can.

"And now, dear Brother, remain true to your flag and your fatherland, do not lose courage and God will never leave you. I will do everything in my power to help at home and otherwise.

"GOD WILL NOT DESERT THE GERMAN."

Such was Woerndle's fidelity. In his mind was the picture of war between the United States and Germany. Such were the expressions of his sentiments when he foresaw that war. How far is this from the true faith of genuine allegiance? In contrast the words of Judge Hunt stand out sharply. (Hauge vs. U. S. 276 Fed. 111-113, 9 CCA):

"What finer test of the disposition of one who wishes to be naturalized can be conceived of than to ascertain whether he is willing to support and defend the nation in time of war? How can one be really attached to the principles of the Constitution and be well disposed to the good order and happiness of the nation, and attempt to escape from the obligation to defend the country, on the ground that he is an alien

and willing to return to his native country and enter its military service?"

Judge Hunt was speaking of neutral alien declarants who were seeking naturalization. Such men are denied citizenship if they claimed exemption from military service on the ground of alienage.

If this is the test of their feelings toward America as prospective citizens, what is to be said of the alien who has actually become a citizen and taken the oath of allegiance?

What of the citizen who in one breath proclaims war between the United States and Germany, and in the next says he would gladly don the uniform and fight in the trenches of Germany?

What of the citizen whose vision of such a war impels him to say that he would not much regret being "chased out of here" as a German, "for this country has in past times acted disgustingly against Germany and the German race. One cannot have much respect left"?

What of the citizen who, in the same letter, pens these two sentences: "And it now seems as if this country too wants to declare war on Germany . . . I have three boys and these would perhaps be needed by my dear old Fatherland after the war."

Is that man "willing to support and defend the

nation in time of war," (quoting Judge Hunt) who says in anticipation of war: "But woe the shores and this flag if it comes that far. Here too there will not remain one stone upon the other if this comes to pass, for the bloodbath which he here prepares will outtop in blackness any shadow which the angel of death has ever thrown on Europe."?

What is to be said of the man whose citizenship is of so little moment that he voluntarily faced a felon's cell to make that citizenship add to the manpower on the German front?

Was it such as he that inspired the Court to say (In re Loen 262 Fed. 167-168).

"Interpretation of the oath of allegiance is more than a mere formula of words. It is the translation of the alien applicant for citizenship from foreign language, foreign history, foreign ideals and foreign loyalty into a living character of our language, of our history, of our life, of our ideals and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its Constitution and laws, which moves him in sincerity to dedicate his life to its service and conscientiously agree to defend it against all enemies, and the implanting in his soul of a sincere determination that in the hour of danger

or attack upon the Constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life to the service and preservation of the Government of the United States, first and always, is unworthy to be admitted to citizenship."

Does an oath of allegiance thus bind a man to loyalty? Or is every citizen free to act and speak as Woerndle did? Had every citizen that license, how long would the nation endure?

The significance of Woerndle's letters is obvious; so plain that argument seems superfluous. Woerndle himself was so conscious of their damning effect that he sought to repudiate them by saying he didn't mean what he said. He merely wrote those things to placate the German censor. (Trans. p. 176.) A ridiculous explanation. It is neither ingenious nor ingenuous.

Woerndle had little cause to fear the German censor. His bete noire was the British censor. It was the British who took American mails off ships, opened and inspected them, and disposed of them at their pleasure. This practice was pressed so far that it led to formal diplomatic protest by the American government. Mr. Lansing, on January 4, 1916, in-

sisted in a note to Great Britain that "mails are not to be censored, confiscated or destroyed on the high seas, even when carried by belligerent mail ships." The British defended their course, April 4, 1916, as a means of intercepting war material destined for Germany, and cited as an instance that as much as 800 pounds of rubber had been sent in a single parcel post. (28 *The Americana* 618.)

The American protest was renewed on May 24, 1916, and the allied governments joined in a long note under date of October 15, 1916. This note asserted the right to open and inspect mail, to have mail bags landed from ships and sent to centers properly equipped for inspection, as a necessary precaution against German wiles. The Allies insisted strongly on their right to confiscate remittances of money, and added: "Nothing, in the opinion of the Allied Governments, seems to justify the liberty granted to the enemy country so to receive funds intended to supply by that amount its financial resisting power."

That the Allies were determined to continue their seizures of mail is thus expressed in the final paragraph:

"Furthermore, should any abuses, grave errors or derelictions committed by the Allied authorities charged with the duty of inspecting

mails be disclosed to the Governments of France and Great Britain, they are now as they ever were ready to settle responsibility therefore in accordance with the principles of law and justice, which it never was and is not now their intention to evade." (17 Messages and Papers of the Presidents 8165-8169.)

This conduct of the British was known to every one in the United States at that time. The newspapers discussed British mail seizures; men talked of it on the street. It was common knowledge. Every man knew it, and Woerndle could not have failed to know it; more especially because he had a lively interest in the matter born of his desire to communicate with his relatives.

Yet he testified that he put the disloyal comment in his letters merely as an expedient to get the letters, with his remittances, past the German censor. And that he used the same method in writing to Hoerner, a German banker, through whom remittances reached his father. (Trans. pp. 176-177.) He had reasoned this out from his own powers of deduction. (Trans. p. 180.)

Viewed from the angle of the German censor, we find Woerndle's explanation equally absurd. The German censor obviously had as his chief objects to prevent the work of spies, to keep military secrets

from reaching the Allies, to influence neutral opinion favorably to Germany and last but not least, to maintain the war morale of the German people. The German censor was not an obstacle to Woerndle; but had he been so, can we believe that he was likely to be put in a good humor by reading that the United States was on the point of entering the war, that only God Almighty could prevent it, that a new and powerful foe was to join the Allies against Germany? Or that the German censor would pass such news to the German people to threaten that morale which the German Government labored so hard to maintain? Could any man in Woerndle's position reasonably believe it, then or now?

The truth is that these letters cannot be explained away. They are convincing in their portrayal of a German heart and mind. Woerndle's attempt to explain was the desperate resource of a man brought to face his own condemnation in his own words. His explanation is so far from being reasonable that it is ridiculous; and any other attempt he might have made to explain would have sounded equally silly.

When the German Herberger (272 Fed. 290) abused America, he was "trying to comfort his sister." The German Woerndle abused America and praised Germany with such enthusiasm as to justify the repetition of Judge Cushman's language in the

Herberger case: "There is too much zest and gusto in the manner in which he goes about it for the Court to conclude that he had not his heart in it."

This Court recognized in the Schurman case (264 Fed. 919) the possibility that a man may honestly renounce an allegiance, and later honestly change his views. No such candor of opinion is claimed by Woerndle. He denies that he held the views expressed by him in his letters, and reflected by his conduct with Boehm. But if his conduct and letters were the expression of a genuine feeling, as they undoubtedly were, then he was not honest in repudiating them, and his denial was only one more attempt to deceive the Court. Such a deceit shows that he was guilt conscious and but emphasizes the disloyal acts and words which he thus repudiates; and thereby force is given to the contention that he never abandoned his allegiance to Germany.

These letters, following the Boehm passport fraud, establish clearly that Woerndle in 1914, 1915 and 1916 had no allegiance to the United States. His mental attitude during those years is thus fixed beyond question. From it, can we determine his mental attitude in 1904, when he was naturalized? Normally, his affection for Germany weakened with increasing years of absence; and his affection for America grew with lengthening years of residence

here. The ties that should have bound him to America ought to have been made stronger by his material prosperity here, by his marriage to an American wife, by the birth in America of three sons—the same three boys who “would perhaps be needed by my dear old Fatherland after the war.”

Therefore, when we show his allegiance in 1914-1916, it follows naturally that this allegiance was stronger ten years earlier, in 1904. He loved Germany more in 1904 than in 1915—he loved America less in 1904 than in 1915. This has been recognized by many courts. This Court said in the Schurman case, 264 Fed. 920 (naturalization in 1904):

“One who spoke in that way, and whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination, to be kept down, but nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment.”

In *United States vs. Darmer*, 249 Fed. 989-990 (naturalization in 1888), the Court said:

“As attachments generally are weakened by length of time and absence from the cherished

object, the contention that it is more likely that it was stronger then than now cannot be said, in the absence of explanation, to be altogether unreasonable."

In *United States vs. Wursterbarth*, 249 Fed. 908-910 (Naturalization in 1882), the Court said:

"As the years succeeding his naturaliation passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office . . . it is natural to presume that his affection, and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease.

"If therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained toward that country an allegiance which the laws of this country re-

quired him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present."

In *United States vs. Herberger*, 272 Fed. 278-289 (Naturalization in 1912), the Court said:

"There is a well known rule that, a state of facts once shown to exist, the same will for a reasonable time be presumed to continue, unless the contrary is shown. There is no more reason for this rule than there is for the converse; that is, that the existence of a condition being shown, in the absence of a showing to the contrary, it will be presumed to have theretofore existed for a reasonable time. No good reason appears why such a rule should not be applied where the state of mind of an individual is in question.

(291) "Loyalty or allegiance is, necessarily of slow growth; therefore somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may

not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

In U. S. vs. Kramer, 262 Fed. 395-397 (5CCA), the Court said:

"If mere removal (from the United States) is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? . . . In a criminal case, a man's intention may be judged by his acts. A conspiracy to defraud is usually proven by showing what the defendant did **after** the date upon which the conspiracy is alleged to have been formed, and the jury may consider such evidence in opposition to the testimony of defendant on the question of intention, and render a verdict of guilty upon it. Why not the same rule in a suit to cancel a certificate of naturalization?

"American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not he is guilty of fraud in obtaining his certificate of citizenship . . .

“ The proof makes out a prima facie case of the disloyalty of the defendant and shows his continuing allegiance to the German Emperor. We think the Court might well have rested a judgment of cancellation upon it, and it was error to dismiss the bill.”

Disloyalty is thus held not to be conclusive, but to establish fraud, in the absence of explanation. The cases are uniform to this effect. They put the burden of explaining upon the defendant. The Wursterbarth case goes so far as to say that doubts should be resolved in favor of the government.

What explanation did Woerndle make? Simply a denial. He denied that he meant the things he wrote, but as has been shown, his denial is contradicted by the tone of the letters themselves and was coupled with a reason why he wrote them (to please the German censor) that is so fanciful that it cannot carry conviction. He assigns a reason for his passport fraud (anxiety for his father), but this is belied by his own dairy and by his letter to Boehm two years later, asking that he go and see the father. The trial court characterized the passport fraud as “indefensible.” (Trans. p. 116.)

Unless Woerndle's reasons for writing his letters and aiding Boehm are believed, the case is denuded of explanations by the defendant. And in the ab-

sence of explanation, Woerndle's disloyalty establishes fraud under all the authorities and by every impulse of reason and common sense. "The criterion of original fraud must be the later conduct," as was said by Judge Hunt.

The trial court did not believe Woerndle's explanation of the passport fraud, for it was characterized as "indefensible." The opinion discloses that the trial court did not credit the German censor explanation of the letters. But the court misapprehended the effect of the disbelief of Woerndle's explanations.

It therefore appears that the trial court erred in determining the effect of uncontroverted facts, and that a sufficient case for cancellation of Woerndle's citizenship was made.

There remains the effect of Woerndle's conduct after February 1, 1917. We have seen what he said and did in the three preceding years. He was actively disloyal, when he believed America's entry into the war was imminent and inevitable. The dismissal of Ambassador von Bernstorff on February 3, 1917, and the subsequent declaration of war presented to his mind no new subject for thought. For nearly two years he had taught himself to contemplate this reality. In the light of his vision of war between the United States and Germany were conceived and delivered his vehement words of hostility against the

United States and of adherence to Germany. This condition of mind is presumed to exist for a reasonable time thereafter, unless the contrary is shown.

But from the first of February, 1917, there is no evidence of any repetition of such acts or words. Why? Was his heart changed so that he was thereafter loyal to America? Or was there a strong reason that sealed his lips and caused him to make a show of loyalty in his own interests? The truth is that in his disloyalty he had violated the law and had perpetrated the passport fraud with Boehm. On February 1, 1917, Boehm was arrested, still masquerading as an American. The Government then began an investigation which, as seen by Woerdle, was likely to expose him, as in fact, later it did. To protect himself, he concealed evidence which would fasten upon him the guilt, not alone of having been implicated in Boehm's original passport fraud, but as well that of being the man in whose mind the corrupt scheme had its birth. For by his own admission, it was he who proposed to Boehm the fraud; it was he who suggested that he give Boehm his certificate of citizenship, and land patents for identification. (Trans. p. 171.)

Thus guilty and thus conscious of his guilt, thus fearful of the consequences and anxious to escape them, can his later conduct have any probative value

favorable to him? In the light of all the facts and circumstances, it can not fairly be said that Woerndle was loyal to America; but rather that he was seeking to divert suspicion from himself.

Two days before the dismissal of von Bernstorff was made public, Woerndle read in the Portland Oregonian a dispatch which was of great concern to him. It was this:

"PASSPORT CASE PROBED

"EXTRADITION OF CAPT. BOEHM IS CONSIDERED

"All Persons Connected With Issuance of Papers
to German to Be Called to Account
by Washington.

"Washington, Jan. 31.—State Department authorities today began a thorough investigation into the issuance and alleged improper use of American passport in the name of Jelks Leroy Thrasher, with which Capt. Hans Boehm, said to be a German army officer, was traveling from Spain to Holland, when taken off the steamer at Falmouth and placed under arrest by the British authorities.

"Work also was begun on new passport

regulations which will be issued in a few days to throw further safe-guards around their issuance and to prevent their use improperly.

"All persons connected with the issuance of the Thrasher passport either have been or will be called to account by agents of the Department of Justice.

"Legal officers of the Government are looking into the question of extraditing Boehm to the United States." (Trans. p. 121-122.)

The next day, February 2, the trail led to Portland, where Woerndle lived. The Oregonian said:

"BOEHM KNOWN HERE

"MAN HELD AS GERMAN SPY IS FORMER PORTLAND MAN—WIFE'S RELATIVES HERE

"Position Held With Hotel and Several Clubs in City and Partnership Is Still Held in Business Enterprise.

"Captain Hans Boehm, who is accused of traveling as an agent of the German government with an American passport bearing the name of Jelks Leroy Thrasher, and whose case is undergoing a rigid examination by the State Depart-

ment, is well known in Portland." (Trans. p. 122-124.)

Conscious of his own guilt and fearful that the investigation now inevitably directed toward Portland, might lead to his door, Woerndle remembered the diary recital of the "grand dinner" with Wessinger and Boehm where Boehm declared his purpose to join the colors, and that Woerndle furnished Boehm with citizenship papers and land patents for identification. He determined to conceal this evidence against him, and prepare a defense in case Boehm's use of his passport might be discovered.

Thereupon he cut out the original page, wrote another, and substituted it. The original and rewritten entries are here repeated.

Original Entries

As Rewritten

"2. Had a grand dinner with Paul Wessinger . . . and H. W. Boehm . . . Boehm says he intends to return to Germany and join the colleurs, and wants to give me power of atty. and make will.

"3. Boehm gave me power of atty. and drew will. I will furnish him with pass— & U. S. citizen papers so he

"Had a grand dinner with Paul Wessinger . . . and H. W. Boehm. Maybe I can't go with Boehm after all, but he says he will go in spite of hell. I only pity my poor father, but then my own family and children. Cecelia does not want me to go and maybe I won't, but I can't just stay. At any rate I will get my passport in shape so

can travel in my name. Also gave him my California land patents for identification. Instructed Secretary of State to forward pass when made out to my address c/o Waldorf Astoria, New York, where Boehm will call for it."

as to have that part ready if I should decide to go. Wrote to Sec. of State to forward my pass to Waldorf Astoria Hotel where I will call for it. Boehm urges all he can for me to go with him. Maybe I will but there will be a surprise when I am gone."

His training as a lawyer, his experience as a Consular representative, his information as a newspaper editor, and his own guilty conscience all warned him of the danger in which he stood. His desire to shield himself is apparent. The next day (Feb. 3, 1917) the situation was made more tense by the dismissal of the German Ambassador.

These events, coupled with the showing of his previous state of mind, show clearly that from February 1, 1917, Woerndle's conduct was inspired by fear of prosecution and his desire to escape it, and though he made a show of loyalty to the United States, it cannot have any value to him. His acts cannot be said to have been moved by loyalty.

The facts here discussed are admitted. Most of them are recited in the stipulation of facts (Trans. p. 63-112) and the others for the greater part are Woerndle's admissions on the witness stand. This

Court is not asked to review findings made by the trial court on conflicting testimony, aided by personal observation of the witnesses.

In *Ridings vs. Johnson*, 128 U. S. 212-218, the Supreme Court said:

“On an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided.”

In *Waterloo Mining Co. vs. Doe* (9CCA), 82 Fed. 45-51, this Court said:

“It is further urged by appellees that this Court is bound by the findings of fact of the Circuit Court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the Court and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. . . . It is to be observed, however, that the findings of fact by the Circuit Court are not without some weight in considering the merits of the case. This case therefore is presented to the Court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the Circuit Court.”

In *U. S. vs. Booth-Kelly Lumber Co.* (9CCA), 203 Fed. 423-429 (affirmed 237 U. S. 481), this Court said:

"The findings in the court below were made upon evidence which had been taken before an examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses."

The Supreme Court examined this case on its merits (237 U. S. 481-484) and affirmed the Circuit Court of Appeals, which had reversed the District Court.

In the case of the Santa Rita (9CCA, 176 Fed. 890-893, this Court said:

"In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libelant's principal witness, who gave direct evidence thereon, testified by depositions. Upon this matter therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position to arrive at a true result was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the

finding will be adhered to, does not apply with the same force."

We challenge the effect given by the trial court to the uncontroverted facts, to the gratuitous passport fraud, and to the expressions in the letters. Woerndle admits that he wrote them—it was stipulated that he wrote them. They are his acts and words for a period of time from October, 1914 to May, 1916, admittedly his, and unexplained save for his statement that he did not mean what he said, if that may be dignified by calling it an explanation.

They are the measure of his allegiance to the United States when the interests of this country came into conflict with those of Germany, when he fully believed that conflict to be so serious that war was inevitable. Under the facts and the law, it is confidently affirmed that Woerndle's oath of allegiance was a fraud upon the court which admitted him, a fraud upon the United States, a fraud upon every loyal citizen, both native and naturalized, and a fraud upon every brave man in American uniform whose blood was spilled on the battlefields of Europe.

Woerndle is one of the class denounced by President Harding in his recent message when he spoke of "those who take on the habiliments of an American without knowing an American soul."

The Stipulation

If the question is in the record, a contention will undoubtedly be made that the court has not the right to consider the recitals in the stipulation of facts as to the contents of Woerndle's letters. This contention will rest upon the search of Woerndle's house and office under search warrants issued on affidavits which did not meet the statutory requirements. No book, paper or document taken on the search, nor any copy thereof, was offered in evidence. The government offered only the stipulation of facts.

The stipulation said (Trans. p. 63) "at the trial of the above entitled cause the facts hereinafter stated shall be taken and deemed to be true; that no evidence thereof shall be required to be offered or produced by either of the parties hereto, and the parties hereby expressly waive any and all objections of every kind as to the manner of proof and as to the sufficiency of the proof of the facts hereinafter stated. All other objections as to the competency, relevancy and materiality of these facts are reserved."

Then follows a recital of facts touching Woerndle's birth, immigration and naturalization, his acquaintance with Boehm and the agreement between them about the passport, that the passport was applied for by Woerndle for Boehm's use, the diary entry of October 3, the actual use of the passport by

Boehm, the cutting out of page 109 of the diary and the substituted entry. After covering the passport episode, the stipulation proceeds: (Trans. p. 67) "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved." Then translations of the letters are set out in full. No other evidence of the letters was used.

Thus the stipulation expressly waives any and all objections of every kind as to the manner of proof and as to the sufficiency of proof of the facts therein stated, and reserves all other objections as to the competency, relevancy and materiality of those facts, as well as constitutional and statutory rights and objections of defendant in reference to the letters. In view of an express waiver of this kind coupled with a statement of reserved objections, it is difficult to see how the reserved objections could be enlarged during the reading of the stipulation, as was attempted by making oral objection to the letters as "incompetent, irrelevant and immaterial, and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the 4th and 5th amendments to the Constitution of the United States." (Trans. p. 171.)

But in any case, if this question is to be considered, it can affect only so much of the stipulation as

recites the letters. The point is not presented as touching the passport fraud and the diary entries relating to it; for it is after the recital of these things that the stipulation says: "Constitutional and statutory rights and objections of defendant in reference to the following letters are reserved" and the oral objection above quoted, made during the reading of the stipulation at the trial, was directed only to the recital of the letters.

Had any of the letters seized, or copies of them, actually been received in evidence, over a proper objection, a different question would be presented. That was not done. Defendant is in the position of saying: I stipulate that I wrote certain German letters, of which these are correct translations, but the court can not consider my stipulation, because the government, in a search which was not valid, laid hold of copies of these letters.

This assumes that the government got the information about the letters shown by the stipulation solely from the search. The record does not so show. So far as appears from the record, the government had other sources of information about these letters; and the search merely confirmed what was already known. Indeed the affidavits for search warrants, although insufficient in law, disclose enough detail to show that considerable information about Woern-dle had reached the government before the search. (Trans. p. 39.)

This may have been through individual informers who were close to Woerndle; it may have been through the now well known activities of the British censorship. It is common knowledge that masses of information about Germans which the British collected were placed by them at the disposal of the American government. It is entirely within the probabilities that knowledge of Woerndle's letters came through such a channel. The record does not show that this was so; neither does it negative these probabilities. And unless the record discloses that the search was the sole source from which the government drew its information, defendant cannot challenge the right of the court to consider the facts he has stipulated to be true.

In *Silverthorne Lumber Co. vs. U. S.*, 251 U. S. 385-392, it was said, discussing the 4th Amendment:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the

way proposed. (*Subpoena duces tecum.*)

Therefore, the individual informer might have been called as a witness and the search would not bar his evidence. The British censorship might have been brought in, if the practical difficulties in the way of such proof could be surmounted, and the search would not bar the evidence. The facts are not "sacred and inaccessible." A stipulation of facts is but another form of evidence. So when defendant chose to stipulate the facts, as he did voluntarily, the search does not bar this form of evidence; when it does not appear that the government is thereby enjoying the advantages of a forbidden search.

The affidavits for search warrants appear at Pages 39 and 43 of the transcript. In the court below, on motion for the return of the things seized under search warrants, no objection was made by the United States Attorney, because the affidavits do not contain the material required by the statute. This is what defendant's counsel refers to in his oral objection (*Trans. p. 171*) when he speaks of "admittedly invalid search warrants." The failure to comply with the statute was not gratuitous, as will be seen by reading the affidavits. From the statements therein, it is apparent that the affiant had knowledge of details which would have enabled him to make a proper affidavit, had the person who prepared the

affidavit been more careful in advising himself about the requirements of the statute before setting out to draw the affidavit. The principal vice of the affidavits is that affiant is made to say "that he has good reason to believe and does verily believe" that certain property used to commit a felony was at Woerndle's house and office; and probably the statement of facts as to the commission of the felony is meager. However, the search warrants were not defended in the court below, and it is not the intention to defend them here.

We have thus far examined the record made for the saving of this question. Let us now see what sort of proceeding this is; for a criminal case or a suit for penalty or forfeiture is one thing, and an ordinary civil suit in equity is quite another. The nature of a suit to cancel a certificate of citizenship is determined by *Johanessen vs. U. S.* 225 U. S. 227-242; *Luria vs.* 231 U. S. 9-24; and *U. S. vs. Ellis*, 185 Fed. 546-549.

In the *Johanessen* case the Supreme Court said: (225 U. S. 242)

"The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges . . . But the act under consideration inflicts

no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown the question whether one who claims the privileges of citizenship under the certificate of a court, has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after a fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his."

In the Luria case it is said: (231 U. S. 24)

"the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate ju-

dicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

In U. S. vs. Ellis, 185 Fed. 546, 549 the court said:

"Public policy requires that no one should be naturalized except he be in the utmost good faith, and in enacting section 15 of the Act of 1906, Congress has done no more than to accentuate what was already apparent, and it has not thereby deprived a naturalized citizen of a vested right nor imposed any penalty upon him."

It therefore appears that this suit is not criminal nor quasi criminal, it is not a suit for a penalty; and it is not a suit for a forfeiture, for that is a proceeding in rem.

Therefore it is to be determined by the law and evidence governing civil causes. The government's case is fully made by the passport fraud alone. The letters are cumulative, but when their weight is added to the passport fraud, the conclusion is irresistible that Woerndle never abandoned his loyalty to Germany; that his oath of allegiance to America was mere lip service which had no response in his heart, and as such was a fraud upon the Court before which he was naturalized.

Respectfully submitted,

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